



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 13, 2005

Mr. Doug Arnold  
Assistant District Attorney  
William County  
405 M.L.K., No. 1  
Georgetown, Texas 78626

OR2005-00439

Dear Mr. Arnold:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 216854

The Williamson County District Attorney's Office (the "district attorney") received a request for information related to a specific case. You state that you have released some of the requested information. You claim that some of the remaining information is not subject to the Act or, alternatively, is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.130 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we note that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* You inform us that some of the submitted information was obtained pursuant to a grand jury subpoena and therefore the information is held by you as an agent of the grand jury. We agree that information obtained pursuant to a grand jury subpoena is in the custody of the district attorney as agent of the grand jury, and it is not subject to disclosure under chapter 552.

We also note that some of the information at issue is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Most of the information at issue consists of a completed investigation made by or for the district attorney. Therefore, as prescribed by section 552.022, the district attorney must release the information unless it is excepted under section 552.108 or confidential under other law. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.111 do not qualify as other law that makes information confidential for the purposes of section 552.022. Thus, information that is subject to section 552.022 may not be withheld under section 552.103 or under section 552.111 of the Government Code. However, we will address your claim under section 552.108.

Section 552.108 of the Government Code provides in pertinent part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

- (4) it is information that:

- (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

- (B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). A governmental body that claims an exception to public disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You contend that the requestor seeks access to the district attorney's entire criminal case file in Cause No. 96-422-K368. In *Curry v. Walker*, the Texas Supreme Court held that a district attorney's decision as to what to include in a case file necessarily reveals the attorney's thought processes concerning the prosecution of the case. *See Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994). Accordingly, the court found that the district attorney's entire case file was protected by the attorney work product privilege. *Id.* at 380-81.

Here, we note your statement that you will release some information from the case file to the requestor. Thus, as you do not seek to withhold the entire case file, we find that *Curry* is not applicable in this instance. *See* Open Records Decision No. 647 (1996) (specific document is not automatically protected by work product privilege because it is part of attorney's litigation file). However, you state that the submitted documents include information that was prepared by the district attorney in the course of preparing for criminal litigation, and that they reveal the district attorney's mental impressions and legal reasoning. Based on your representations in that regard and our review of the submitted information, we determine that section 552.108(a)(4) is applicable to portions of the information. Accordingly, we have marked the information that may be withheld pursuant to section 552.108(a)(4) of the Government Code.

You claim that some of the submitted information is confidential under section 552.101 of the Government Code which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2)(B). With respect to the remaining submitted information, we find the district attorney must withhold any CHRI falling within the ambit of these state and federal regulations pursuant to section 552.101 of the Government Code.

You also claim that the presentence investigation report within the submitted information is protected by article 42.12 of the Code of Criminal Procedure, which is also encompassed by section 552.101. Article 42.12 provides in part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant. Medical and psychiatric records obtained by court order shall be kept separate from the defendant's community supervision file and may be released only by order of the judge.

Crim. Proc. Code art. 42.12 § 9(j). None of the circumstances described in subsections (d), (e), (f), (h), (k), or (l) of section 9 appears to be present in this instance. Therefore, the district attorney must withhold the presentence investigation report, which we have marked, under section 552.101 of the Government Code in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure.

We note that some of the information subject to section 552.022 is protected by common-law privacy, which is also encompassed by section 552.101. Common-law privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the

submitted records and marked the information that the district attorney must withhold under section 552.101 in conjunction with common-law privacy.

You also contend that other submitted information must be withheld under section 552.130 of the Government Code. This section excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." We note, however, that section 552.130 excepts information from disclosure in order to protect individuals' privacy. Therefore, the requestor is entitled to his client's driver's license number and information pertaining to motor vehicles in which his client owns an interest, and such information may not be withheld under section 552.130. *See* Gov't Code § 552.023(b) (governmental body may not deny access to information to person to whom information relates on grounds that information is considered confidential by privacy principles).

We now turn to your arguments regarding the submitted parole letter which is not subject to section 552.022. You claim it is excepted from disclosure under section 552.103 of the Government Code. This section provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party. . . .

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The district attorney has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district attorney must meet both prongs of this test for information to be excepted under 552.103(a).

This office has determined that contested case hearings that are conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, do constitute litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). To demonstrate that litigation is reasonably anticipated, the district attorney

must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you do not represent that there are any pending charges involving this information nor do you inform this office that you intended to bring any charges. Instead you inform this office that a conviction has already been obtained and the information at issue was prepared in anticipation of a parole review, which you assert constitutes litigation for purposes of section 552.103. We note, however, that the parole review process is expressly exempted from the contested case and court enforcement provisions of the APA. *See* Gov't Code §§ 508.036(d), 2001.223(3). Further you failed to otherwise explain how the parole review process would constitute litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See generally* Open Records Decision No. 301 (1982) (discussing meaning of "litigation" under predecessor to section 552.103). Therefore, having considered your argument and representation, we find that you have failed to establish that litigation was pending or reasonably anticipated at the time this request was received. Thus, the submitted parole letter may not be withheld under section 552.103.

In summary, (1) records that the district attorney maintains as the agent of the grand jury are in the constructive possession of the grand jury and are not subject to public disclosure under the Act; (2) we have marked information that the district attorney may withhold pursuant to section 552.108(a)(4); (3) to the extent the district attorney holds any criminal history record information in the submitted investigation it must be withheld pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal regulations; (4) we have marked the presentence investigation report which must be withheld under 552.101 in conjunction with section 9(j) of article 42.12 of the Code of Criminal Procedure; (5) we have marked the information that must be withheld under section 552.101 and common-law privacy. The remainder of the submitted information must be released to this requestor.<sup>1</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

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<sup>1</sup>Because the records being released contain information relating to the requestor's client that would be excepted from disclosure to the general public to protect his privacy, the district attorney must request another ruling from our office if it receives a future request for this information from an individual other than the requestor or his client.

filing suit in Travis County within 30 calendar days. Id. § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. Id. § 552.321(a).

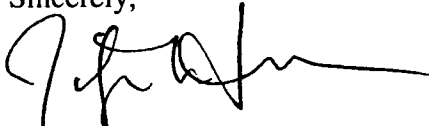
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. Id. § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. Id. § 552.321(a); Texas Dep't of Pub. Safety v. Gilbreath, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Thompson', with a long horizontal flourish extending to the right.

Jadlyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/jev

Ref: ID# 216854

Enc. Submitted documents

c: Mr. Gary Cohen  
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(w/o enclosures)